No. 91-550

IN THE

Supreme Court of the United States

October Term 1991

RONNIE MILLIGAN,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

In a death case, where the first time denial of Sixth Amendment effective counsel could be raised was post-conviction, does summary dismissal of a post-conviction appeal deny due process and equal protection?

2.

Did application of a new doctrine that a witness was not an enlarge the scope of criminal liability, and deprive petitioner of due process of law?

3.

Are the conviction and sentence supported by the evidence?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The parties to this proceeding are listed in the caption, and are RONNIE MILLIGAN [hereinafter "Milligan"] and THE STATE OF NEVADA [hereinafter "the State."]

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REPORTS OF OPINIONS[1]

Review is sought herein of the unpublished *Order Dismissing Appeal* by the Nevada Supreme Court filed June 17, 1991 [2a]. A petition for rehearing was denied by an Order Denying Rehearing filed August 28, 1991 [1a].

The appeal was taken from an unpublished opinion of the District Court of the Sixth Judicial District Court of the State of Nevada, Humboldt County, filed September 14, 1990 [5a-44a] denying post-conviction relief.

Petitioner's murder conviction was affirmed by the Nevada Supreme Court on direct appeal in *Milligan v. State of Nevada,*

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[1]References to the Appendix appear as a number followed by "a", for example: [1a].

101 Nev. 627, 708 P.2d 289 (1985). A petition to review that decision on certiorari was denied by the United States Supreme Court in *Milligan v. State of Nevada*, 479 U.S. 870, 93 L.Ed.2d 163, 107 S.Ct. 238 (1986).

A current Order of the Nevada Supreme Court [44a] stays the remittitur of the case [and execution of the death sentence] until October 5, 1991, and thereafter, during the pendency of this Petition, if the Petition be filed within the stay period.

JURISDICTIONAL STATEMENT

This court's jursdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

I. SUMMARY STATE DISPOSITION OF CONSTITUTIONAL ISSUES

There were a number of crucial instances of ineffective counsel in Milligan's trial and his direct appeal. In Nevada, the first opportunity a defendant has to litigate ineffectiveness of counsel is in a post-conviction proceeding under NRS 177.315. Ineffectiveness of trial counsel cannot be raised on direct appeal because it is necessary to have an evidentiary hearing where trial counsel has an opportunity to explain his conduct. *Gibbons v. State*, 97 Nev. 520, 522, 634 P.2d 1214, 1216 (1981); *Lewis v. State*, 100 Nev. 456, 461, 686 P.2d 219 (1986). Ineffective representaton by counsel on appeal is, of necessity, an issue which cannot be considered on a direct appeal.

Milligan's filed his petition for post-conviction relief on May 13, 1987. A three-day evidentiary hearing on the issues set

below[2] began September 19, 1988. The lower (trial) court

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[2]I. CONVICTION ON UNCORROBORATED ACCOMPLICE TESTIMONY VIOLATED DUE PROCESS AND EQUAL PROTECTION OF THE LAW, FOURTEENTH AMENDMENT AND EX POST FACTO DOCTRINE OF ART I, SEC. 10, PARA. 1, UNITED STATES CONSTITUTION.

(a) Presence or proximity to another involved in the offense does not constitute independent corroboration; (b) evidence which merely shows commission of the offense or circumstances thereof does not tend to connect defendant to commission of the offense; (c) Houston's status as an accomplice is not a matter controlled by the prosecutor; and (d) Self-serving statements of an accomplice about his absence of criminal intent are not sufficient to remove the issue from the jury; (e) lower court refusal to meet facts and abide by Nevada law; (f) Ramon Houston was an accomplice; (g) absence of corroboration of an accomplice; (h) one hair and "presumptive" test for blood insufficient; (i) false finding of "constructive possession" of the van; and (j) Nearness to purse not an incriminating circumstance.

II. MILLIGAN WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AT HIS TRIAL AND ON APPEAL BY THEIR FAILURE TO PERCEIVE AND PROPERLY UTILIZE THE ISSUE OF LACK OF CORROBORATION OF ACCOMPLICE TESTIMONY.

III. DEPRIVATION OF EFFECTIVE COUNSEL AT GUILT AND PENALTY PHASES:

(a) Failure to take interlocutory appeal on denial of change of venue; (b) failure to discover and use impeaching evidence [human blood stains on Houston's boots and clothing; failure to discover pattern of wetness on Houston's clothing]; (c) rejection of exculpatory, mitigating evidence [Bonnette's offered testimony]; (d) guilt phase evidentiary failures [failure to corroborate Milligan's life achievements with documentary exhibits; directing Milligan not to testify.].

IV. MILLIGAN WAS DEPRIVED OF COUNSEL AT PENALTY PHASE: (A) ABSENCE OF EXPERIENCED COUNSEL: (B) SUMMATION BY WHOLLY INEXPERIENCED MONITORING ATTORNEY: (C) FAILURE TO PRESENT MILLIGAN DURING PENALTY PHASE.

V. DEATH SENTENCE LACKS PROPORTIONALITY AND IS CRUEL AND UNUSUAL PUNISHMENT.

rendered its decision [without making any findings of fact][3] on September 14, 1990 [5a-44a].

Milligan filed a timely appeal to the Nevada Supreme Court on September 20, 1990[4]. Briefing was complete on January 14, 1991. Oral argument before the Nevada Supreme Court was conducted on May 16, 1991. Milligan's counsel was allowed 15 minutes to argue his appeal, and the Court permitted counsel to argue another two or three minutes "since this was a death case."

The Nevada Supreme Court did not file an opinion on this appeal; instead, on June 17, 1991, the Court filed a document entitled: "Order Dismissing Appeal" (2a) consisting of three paragraphs, ruling:

> **First:** *Orfield v. State*, 105 Nev. 107, 771 P.2d 148 (1989) held Houston was not an accomplice and *Orfield* is controlling authority on this issue[5]. **Second:** Milligan failed to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the

[3]Findings of fact are required to be made by NRS 177.375(2).

[4]There has never been a "procedural default" in this case. Milligan's appeal was timely and he raised all of the issues noted in footnote 2 hereof as follows: I, pp 8-21; II, pp 25-30; III, pp 30-44; IV, pp 44-50; and V, pp 50-53.

[5]MIlligan was not a party or participant in the trials of Katherine Orfield, therefore, as to Milligan, *Orfield v. State*, could not possibly be *res judicata* or law of the case.

Although Milligan was jointly charged with murder, felony murder (robbery) along with Hale, Bonnette and Orfield, their counsel appealed a denial of a change of venue and their trial was considerably later. Their appeals were consolidated with Milligan's direct appeal. Their convictions were reversed for error in the instruction defining reasonable doubt.

After remand, Orfield was convicted of second degree murder.

The opinion in Orfield's direct appeal after retrial [in which Milligan was not a party and not represented in any manner] is the Orfield case referenced in the Order Dismissing Appeal of Milligan.

result of the proceeding would have been different. **Third:** The proprotionality issue was reviewed on Milligan's direct appeal and ruled adversely to Milligan[6]. These statements are now the law of the case

Milligan timely filed a petition for rehearing on July 1, 1991, wherein he pointed out:

(a) the summary disposition of his appeal was contrary to NRS 177.385[7] and a denial of due process and equal protection of the law under the Fourteenth Amendment of the U.S. Constitution (Ptn, pp 1-3).

(b) that application to Milligan on the novel and unprecedented holding in *Orfield v. State, supra*, that the status of one as an accomplice is a matter for decision on appeal by the Supreme Court of Nevada and not a duly instructed jury, violated the *ex post facto* clause of Art. I, Sec. 10, para. 1, and the Due Process Clause of the Fourteenth Amendment fo the United States Constitution (Ptn. pp 3-4); and

(c) that the proportionality consideration on Milligan's direct appeal was made at the same time as the convictions of Orfield, Hale and Bonnette were vacated, and preceding the material developed at Milligan's post-conviction proceeding (Ptn pp 5-6).

Milligan also relied on the holding of *Parker v. Dugger*, 498 U.S. ____, 112 L.Ed.2d 812, 826-827, 111 S.Ct. 731 (1991)

[6]Orfield was sentenced to life with the possibility of parole; Bonnette plead guilty to murder and was sentenced to life with the possibility of parole; and Hale was sentenced to life imprisonment.

[7]NRS 177.385. **Review.** A final judgment entered on an application for post-conviction relief may be reviewed by the supreme court of this state on appeal, brought either by the petitioner or by the state as provided by law.

[Ptn. pp 4-6], that states which have determined that death is an available penalty, must administer that penalty in a way rationally to distinguish between those persons for whom death is appropriate and those for whom it is not, and also stressing that meaningful appellate review, considering the defendant's actual record, is crucial to insure the death penalty is not imposed arbitrarily or irrationally.

Milligan's petition for rehearing was denied on August 28, 1991 (1a).

Post-conviction proceedings are required to be brought *only* in the court of conviction, before the judge who presided at the trial and who imposed sentence[8]. The cases in Nevada are virtually legion in which a collegial opinion is written by the Nevada Supreme Court on post-conviction appeals.[9]

The United States Court of Appeals for the Ninth Circuit has very recently spoken of the importance of an adequate review on appeal to the highest court of the State in *Jennison v. Goldsmith*, Docket No. 87-2977, 9th Cir., decided August 8, 1991 [noted 49 CRL 1448]. Arizona has a hierarchy of courts including a Court of Appeals, from which review by the Arizona Supreme Court is discretionary. *Arizona v. Sandon*, 777 P.2d 220 (Ariz. Sup.Ct. 1989). In *Jennison* the Arizona Supreme Court held that the Court of Appeals' rejection of a prisoner's

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[8]NRS 177.325. **Commencement of proceedings: Verification; filing; service.** The proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place. The clerk shall docket the petition upon its receipt and promptly bring it to the attention of the court and deliver a copy to the district attorney.

[9]To note only a few: *Sanborn v. State*, 107 Nev. #63, 812 P.2d 1279 (1991); *Walters v. State*, 106 Nev. 45, 786 P.2d 1202 (1990); *Wolf v. Nevada*, 106 Nev. Adv. Opn. #80, 794 P.2d 721 (1990); *Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989); *Warner v. State*, 102 Nev. 635, 729 P.2d 1359 (1986).

Anders "no-merit" claim was exhaustion of state remedies for purposes of federal habeas review. The Ninth Circuit held a state prisoner may not have an appeal in the Arizona Supreme Court as a matter of *state* right, he does have a right to raise before the Arizona Supreme Court any issue he seeks to raise in federal habeas. This right was held not be be subordinate to the desire of the Arizona Supreme Court to lighten its load and streamline the habeas process.

By contrast, Nevada has no intermediate appellate court, and Milligan had a right of appeal under NRS 177.384 (quoted at footnote 7 above). Milligan also had a federal right (apart from state law) to raise each and all of the constitutional issues he raised in his post-conviction proceeding, and to have a responsible decision by a responsible appellate court.[10]

Milligan had a right to effective counsel on his direct appeal, as a matter of Constitutional right, and since the post-conviction proceeding was his first opportunity to assert that right, his appeal from a denial of post-conviction relief was also a matter of Constitutional right under both the Due Process Clause and the Equal Protection of Law Clause of the Fourteenth Amendment of the United States Constitution. *Evitts v. Lucey* 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985).

Increasingly, the United States Supreme Court is looking to the States to carry the burden of applying the United States Constitution in State criminal proceedings. *Coleman v. Thompson*, U.S. 6/24/91, No. 89-7662, 49 CrL 2303, not yet officially reported. Certainly *some* court has to carry the burden, and the burden has been ignored in this case by the State of Nevada.

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[10]The Nevada Supreme Court not only dealt with the issues summarily, it ignored that the "decision" of the trial and sentencing court was fillled with conjecture, surmise and unsupported presumptions and assumptions and error as to the state of the record.

II. UNCONSTITUTIONAL APPLICATION OF A NEW DOCTRINE ENLARGING CRIMINAL LIABILITY

Orfield v. State, supra, was decided while Milligan's post-conviction proceeding was pending before the trial judge. Originally the opinion was rendered as a memorandum opinion, which, in Nevada, means that the opinion cannot be relied on as precedent. The district attorney sought to rely on the opinion before the trial judge, but was met with Milligan's objections that an unpublished opinion is not authority in any other case. The district attorney then applied to the Nevada Supreme Court in *ex parte* proceedings to have the opinion published. Then, the trial judge (who had also presided in both Orfield trials) well knowing Milligan's objections that he was not a party to and not represented in *Orfield,* and therefore not bound by any determination therein respecting the status of Houston as an accomplice, nevertheless asserted that the issue "has been pretty well put to rest in the case of *Orfield v. State,* 105 Nev. Advance Opinion 22." (38a) The trial judge also knew and related that Bonnette testifed in the Orfield trial that Houston kicked the victim in the abdomen, causing her to fall to the ground (28a). On appeal the Nevada Supreme Court said of Milligan's contentions: "We hold *Orfield* to be controlling authority and reject appellant's contentions on this issue." (2a) *Orfield* had held:

> "Houston abandoned the group at the first opportunity after the attack and immediately led the police to [the victim] so she could be treated. He implicated appellant and the others with his statements and actions before his arrest. Houston's acts are sufficient circumstantial evidence from which lack of participation in the criminal intent can be inferred. *Cf. Robert-*

son v. Sheriff, 85 Nev. 581, 583, 462 P.2d 528, 529 (1969)."[11]

This amounts to a holding that on review in the Nevada Supreme Court, the issue whether or not one was an accomplice will be decided by the Nevada Supreme Court, instead of the trial jury, and that a person who abandons group activity — after the crime has been committed by somebody — is not an accomplice because his conduct before arrest supports a finding he had no criminal intent. This doctrine is directly contrary to *Austin v. State*, 87 Nev. 578, 587-88, 491 P2dd 724, 730 (1971) which holds that the criminal intent of a witness who testified he feigned complicity in the crime, is a matter for jury determination. Other Nevada authority so holding is set out below.[12] Nevada has held that any change in the statute is a matter for the legislature and not the Court.[13] The doctrine contravenes a Nevada statute requiring that in a capital case every issue of fact be determined by a jury[14].

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[11]*Robertson* held that there was a probable cause to hold a defendant for trial on a charge of robbery where he was in the company of others, one of whom committed a robbery. *Robertson* itself makes the point that proof beyond a reasonable doubt is not necessary to bind an accused over after preliminary hearing. Moreover, that case involved NO issue of accomplice testimony.

[12]*Howard v. State*, 102 Nev. 577, 729 P.2d 1341, 1344 (1986); *Globensky v. State*, 96 Nev. 113, 605 P.2d 215 (1980); *Cutler v. State*, 93 Nev. 329, 566 P.2d 809, 812 (1977); *Pineda v. Sheriff*, 89 Nev. 426, 514 P.2d 651 (1973); *Tellis v. State*, 84 Nev. 587, 445 P.2d 938 (1968); *State v. Verganadis* 50 Nev. 1, 248 Pac 800 (1926); *In re Bowman and Best*, 38 Nev. 484, 151 Pac 517 (1915).

[13]*Matter of Sullivan*, 71 Nev. 90, 280 P.2d 965 (1966); *Austin v. State, Supra*, 87 Nev. at 586.

[14]NRS 175.011 **Trial by Jury.**

1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state. *A defendant who pleads not guilty*

This holding is a novel, unprecedented doctrine enlarging the scope of criminality in Nevada. The doctrine did not exist at the time of the offense, or at the time of Milligan's trial. He is not bound by the decision because he was not a party and not represented in *Orfield*.

Since 1861, Nevada's Legislature has required independent corroboration of accomplice testimony[15] under the following philosophy:

> By NRS 175.291, our legislature has declared that one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise

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to the charge of a capital offense must be tried by jury. (emphasis added.)

Milligan contends there was not sufficient corroboration of accomplice testimony to even hold him for trial under a probable cause determination. Had there been, the jury instructions were flawed because the jury was not told an issue existed whether or not Houston was an accomplice, and if he were found to be an accomplice, only certain kinds of evidence could be deemed corroborative under the statute.

[15]Stat. 1861, 473, Sec. 365: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, or the circumstances thereof."

Today, the statute provides:

NRS 175.291 Testimony of accomplice must be corroborated; sufficiency of corroboration; accomplice defined.

1. A conviction shall not be held on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstance thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the case in which the testimony of the accomplice is given. [Nevada Laws, 1967, p. 1429].

> to the dignity of proof beyond a reasonable doubt. To this legislative policy we must give meaningful effect." *Austin v. State*, 87 Nev. 478 at 588, 491 P.2d 724 (1971)

In Nevada, proof of corroboration of accomplice testimony is an *element* of any crime in which accomplice testimony is relied on. The same is true in Arkansas under a virtually identical statute. In the case of *Dubois v. Lockhart*, 859 F.2d 1314, 1316-1318 (8th Cir. 1988), the court held the statute erects an absolute bar to conviction where an accomplice testifies and no corroborating evidence is offered. This presumption does not go to the weight of the evidence, and it is not an instance of a court disagreeing with the jury's verdict. Nor does it involve witness credibility. Until corroborating evidence is offered, the evidence is simply insufficient to sustain a conviction. In that case, as in the present one, the insufficiency of the trial evidence meant that the conviction had to be vacated and no new trial was authorized because further prosecution would violate the Double Jeorpardy Clause under *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

On his appeal, Milligan relied on *Bouie v. City of Colombia*, 378 U.S. 347, 12 L.Ed.2d. 894, 84 S.Ct. 1697 (1964) and *Marks v. United States*, 430 U.S. 188, 51 L.Ed.2d 260, 97 S.Ct. 990 (1979) to show that the *Orfield* doctrine could not constitutionally be applied to *Milligan* (Opn. Brf. p. 16). The recent case of *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991), is instructive that a new interpretation of a statute dealing with juvenile court jurisdiction was an unforeseeable change in the law and could not be applied to a juvenile whose crime was committed before the determination and who would face increased punishment as a result of waiver of juvenile court jurisdiction.

In the instant case, but for the deficiency of Milligan's at-

torney at the preliminary hearing, Milligan should not have been bound over for trial on uncorroborated testimony of an accomplice; at the very least, Milligan could have obtained his freedom on pretrial habeas, under a long, long line of cases in Nevada.[16] The Application of the novel *Orfield* doctine that an accomplice can cleanse himself of complicity by abandoning the group after the deed is done and testifying in exchange for complete immunity, enlarges the scope of criminal liability and offends the Due Process Clause of the Fourteenth Amendment of the United States Constitution when it is retroactively applied.

Since Houston's testimony was not corroborated as required by the statute[17], the only way the Nevada Supreme Court could uphold the conviction and the imposition of the death penalty was to decide, by fiat, that Houston was not an accomplice. That fiat is what has retroactively deprived Milligan of his constitutional rights.

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[16]*Eckert v. State*, 91 Nev. 183, 186, 533 P.2d 468 (1975); *Wellman v. Sheriff*, 90 Nev. 174, 175, 521 P.2d 365 (1974); *Lamb v. Bennett*, 87 Nev. 89, 91, 482 P.2d 298 (1971); *In re Hutchinson*, 76 Nev. 478, 357 P.2d 589 (1960).

[17]The corroborative proof is required to implicate the accused in the commission of the crime; proof of presence alone is not sufficient. *Austin v. State, supra*, 491 P.2d at 729; *Ex Parte Hutchinson, supra*. Mere presence is all that was shown here:

> "It appears to the court that the hair and blood exhibits show that the Defendant was at the scene of the crime. The presence of the victim's purse near the car where Defendant was standing at Golconda and constructive possession of the Volkswagen establishes a prima facie case against Defendant." (Trial Court, 36a)

As noted, there were no facts to show Milligan had control of the VW van or Hale who had possession of the van.

III. EVIDENCE DOES NOT SUPPORT CONVICTION[18]

Milligan, in 1980, at age 30, was a drifting alcoholic working as a deck hand on a barge that traveled from New Orleans to St. Louis. Milligan met Terry Bonnette in Baton Rouge, Louisiana. Through Terry, Milligan became acquainted with Terry's girlfriend, Katherine Orfield and Paris Leon Hale. This group, riding in Bonnette's car, began a trip that eventually led them into Nevada, on July 5, 1980. A hitchhiker named Ramon Mendez Houston, a Mexican illegally in the United States, had joined the group a few days earlier.

Milligan was drinking during the entire trip. On July 4, 1980, the party got out of the car at the Valmy rest stop. That day Milligan drank heavily of brandy, wine and whiskey. Milligan's last memory was of Bonnette saying he would pull the car up near the picnic table so they could hear the radio. The next thing Milligan remembered he was sitting in the back of a police car at Golconda, Nevada, under arrest [along with Hale, Bonnette and Katherine Orfield] for robbery and assault on an elderly victim found in the desert. The victim remained comatose until her death 21 days later from complications arising from a skull fracture inflicted by a 12 pound sledgehammer.

Milligan had an unusual background. He was born and reared in Tennessee and was active in sports at Woodbury High school where he was a football quarterback and one of the three co-captains of the football team. His life in high school was without any disciplinary event. Milligan attended the Church of Christ

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[18]Reference is also made to the material under subdivisions "I" and "II" hereof in support of the matter considered herein.

until he was about 17 or 18 years old. Milligan had never committed any acts of violence.[19]

After attending Middle Tennessee State College for a semester, the pattern of Milligan's life changed sharply. Milligan's younger brother, Barry Milligan, related that at about this time their father, an alcoholic also involved with drugs, committed a series of abuses of their mother, chasing her with a poker, with a coke bottle, and tackling her in the dining room. The family splintered in divorce: Milligan went into the Navy, Barry and a young sister, were sent away to boarding school.

Miligan first began drinking the night before he enlisted in the Navy at age 19. The next four years, Milligan was stationed at Florida, Maryland and Iceland. He was twice elected Sailor of the Month. Milligan received a commendation for his acts in connection with a shipboard fire. He was honorably discharged from the Navy. Milligan continued to drink while he was in service.

In civilian life, Milligan worked for a manufacturing company, drove a truck, and roofed. His last work was as a river boat deck hand. Milligan was hospitalized for alcoholism at the Veterans Hospital, Murfreesboro, Tennessee, in 1976 and again in 1978 at Charity Hospital in New Orleans, Louisiana.

Milligan, Hale, Bonnette and Katherine Orfield were jointly charged with felony (robbery) murder. Milligan stood trial alone — the first of the group to be tried. [20] The only witness

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[19] Ronnie's sole brush with the law was in 1979 for theft of an article valued at $1.00 for which he was sentenced, alternatively, to a fine of $20.00 or 14 days in jail.

[20]Counsel for other defendants availed themselves of a then-existing right of intermediate appeal from the denial of a motion for a change of venue. After other defendants had been tried, their appeals were consolidated with Milligan's appeal. Their convictions were reversed for an error in

against him was the hitchhiker, Ramon Mendez Houston, who testified under a grant of complete, transactional immunity. Houston's testimony, described in the opinion affirming Milligan's conviction [*Milligan v. State*, 101 Nev 627 at 630, 708 P.2d 289)] appears below.[21]

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in the trial court's instruction on reasonable doubt. After remand, Orfield was convicted of second degree murder and sentenced to life with the possibility of parole; Bonette plead guilty to murder and was sentenced to life with the possibility of parole; and Hale was sentenced to life imprisonment.

[21]"The state's chief witness at each of the appellants' trials was Ramon Houston, an illegal alien whom the appellants had picked up hitchhiking a few days before the murder. Houston was given complete immunity in exchange for his testimony.

"Houston testified that on July 4, 1980, he had been traveling with the group for three or four days. They were headed west on Interstate 80 when they stopped at the Valmy rest area to have lunch.

"While at the rest area, the group met Zolihar. Voinski. Ms. Voinski was driving a Volkswagen van which, for some unexplained reason, was disabled at the rest area. Hale made an unsuccessful attempt to start the van for Ms. Voinski.

"After some discussion, the entire group, including Ms. Voinski, climbed into Bonnette's car. With Bonnette driving, they proceeded west until they turned off the interstate. According to Houston, they turned on a dirt road and drove for a few minutes; then Bonnette stopped the car.

"Hale got out of the back seat and pulled Ms. Voinski out of the car. While Hale repeatedly hit Ms. Voinski on the head with a screwdriver, Bonnette and Orfield tore her purse from her hands.

"Houston testified he stayed near the back of the car and was afraid to intercede on Ms. Voinski's behalf. As he turned away and then looked back, Houston saw Ms. Voinski lying on the ground and Milligan hitting her head with a sledge hammer.

"When the assault abated, Milligan put the sledge hammer in the front seat of the car while Hale and Bonnette talked things over. The group, including Houston, got back into the car leaving Ms. Voinski bleeding on the desert floor. As they left, Bonnette handed Ms. Voinski's money to Hale. Before reentering the interstate Orfield wiped the blood from the sledgehammer and gave it to Houston to throw into the desert. At the same time Houston hid Ms. Voinski's purse in a bush.

Houston *was* an accomplice. The record of this case also shows that before the group ever left Valmy rest stop, Houston had stealthily extracted papers from the victim's purse and showed them to Orfield. Orfield gave a statement that it was Houston who took the hammer out of the car. Bonnette testified at Orfield's trial that Houston kicked the victim in the groin and caused her to fall to the ground. Houston did not attempt to withdraw himself from the activity until the group arrived in Golconda. He threw the sledgehammer into the desert. He hid the victim's purse in a bush. He returned to the car with the victim's identification papers he had picked up at the scene. When Houston tried to burn these papers, Orfield told him to put them in his pocket and Houston still had these papers at the arrest scene.

Houston's testimony that he stayed out of range of the assault was false. (a) Houston was jailed as a material witness. A deputy gave his clothing to a trustee for washing. The trustee noticed the clothing was already wet and the shirt had unusual orange specks. The trustee reported this to another deputy, James, and asked if the clothing should be preserved as evidence, but the deputy said: "No, wash them." Even after the washing, Houston's shirt still tested positive for blood stains. (b) Houston had human blood on his boots.[22]

"According to Houston, the group returned to the rest area where Hale and Milligan climbed into Ms. Voinski's van. Both vehicles headed west for a short while until they stopped so Bonnette could join Hale and Milligan in the van. They then proceeded on for some time until they met at a bar.

"Once at the bar, Houston claimed he had to use the restroom so he could get away from the group. Houston climbed out the restroom window and attracted the attention of someone who helped him contact law enforcement officers. Those officers eventually arrested the appellants."

[22]Some of these facts were discovered after the trial because Ronnie's trial attorney believed, ***in error***, that Houston was corroborated by evidence in possession of the prosecutor.

Ronnie's presence at the scene [shown by a "presumptive" test for

The trial judge scraped the bucket for something to implicate Milligan in the offense. First Judge Young said that Milligan had constructive possession of the victim's van although there was no shred of evidence that Milligan ever had control of the van or Hale, who drove it. Next, Judge Young pointed to the fact that after Bonnette's car had been towed from the arrest scene, a purse of the victim was uncovered and that when Milligan was arrested he was leaning against the back of Bonnette's car. The police did not see the purse before the car was towed. Bonnette testified at Orfield's trial that Orfield was the only person who could have put the purse under the car.

No evidence independently linked Milligan to participation in the scheme to rob, deceive and transport the victim or to the fatal assault on her. No evidence linked Milligan to the robbery of the victim.

Nevada has held, historically and consistently, that the physical proximity of an accused to the scene of an offense is not incriminating[23] and is enough for corroboration.[24]

Contrary to that long history, the trial court relied on a long, general quotation from CJS and cases from Montana, Minne-

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blood on Milligan's tennis shoes and the presence of a hair similar to that of the victim's hair on one of Ronnie's shoes] was sufficient corroboration. The expert who examined the shoes could not find any substance he would confirm was blood. At most he obtained positive results from a "presumptive" test for blood from spots on the top of Ronnie's shoes. This evidence merely showed, at most, presence at the scene, but did not independently implicate Ronnie in the fatal injury to the victim.

[23]*Skinner v. Sheriff*, 93 Nev. 340, 341, 566 P.2d 80 (1977); *Winston v. Sheriff*, 92 Nev. 616, 555 P.2d 1234 (1976); *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987).

[24]*Austin v. State*, 87 Nev. 578, 491 P.2d 724 (1971); *Glipsey v. Sheriff*, 89 Nev. 221, 510 P.2d 623 (1973); *In re Hutchinson*, 76 Nev. 478, 357 P.2d 589 (1960).

sota and Oregon which either did not support the holding or were decided under materially different statutes. The Nevada Supreme Court merely decided the case by judicial fiat.

As already noted, Houston was granted complete immunity for his role in the offense. The remaining defendants received sentences to life imprisonment. Only Milligan, a man who should have been released from Nevada's custody at the time of the preliminary hearing, has been sentenced to death. The proof at the trial is not sufficient for criminal conviction, and not a sufficient basis on which rationally to distinguish those for whom death is appropriate penalty and those for whom it is not.

REASONS FOR GRANTING THE WRIT

As set forth in Rule 10, Supreme Court Rules, certiorari may properly be granted when a state court has decided a federal question in a way that conflicts with applicable decisions of this Court.

In the present case, the state court has rendered an arbitrary decision, contrary to the law as it existed in Nevada at the time of the alleged offense. The Nevada decision also contravenes the law of the United States Supreme Court in *Evitts v. Lucey, supra,* and *Burks v. United States, supra,* whereby an innocent man is now being held under a death sentence for the crime of murder.

A further reason to grant certiorari is to clarify the principle of comity which has so long informed relations between state and federal courts on constitutional issues. The viability of that principle and practice is jeopardized when the highest court of a state fails responsibly to perform its sworn obligation to uphold the Constitution of the United States. True

in any case, this reason is compellingly true where life is at stake.

As already noted in *Jennison v. Goldsmith, supra*, the State of Arizona has attempted to avoid decisions on Constitutional issues in an attempt to shuffle the litigation immediately to federal courts. Other States may follow the same tactic.

This is a situation which calls out for a remedy.

Respectfully submitted:

ANNETTE R. QUINTANA, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Petitioner
Ronnie Milligan

APPENDIX
IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE MILLIGAN, Appellant, vs. THE STATE OF NEVADA, Respondent	)	**No. 21504** FILED AUG 28 1991 Clerk of Supreme Court By J. Richards Chief Deputy Clerk

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.[1]

/s/_____, C.J.
Mowbray
/s/_____, J.
Springer

/s/_____, J.
Rose

/s/_____, J.
Steffen

cc: Hon. Richard Wagner, District Judge
Hon. Frankie Sue Del Papa, Attorney General
William H. Smith
Susan Harrer, Clerk

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[1]The Honorable Cliff Young, Justice, did not participate in the decision of this appeal.

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE MILLIGAN, Appellant, vs. THE STATE OF NEVADA, Respondent	)	No. 21504 FILED JUN 17 1991 Clerk of Supreme Court By J. Richards Chief Deputy Clerk

ORDER DISMISSING APPEAL

This is an appeal from a decision of the district court denying appellant's petition for post conviction relief in a death penalty case.

Appellant first contends that he was improperly convicted based upon the uncorroborated testimony of an accomplice. This court held in Orfield v. State, 105 Nev. 107, 771 P.2d 148 (1989), that Ramon Houston was not an accomplice. The facts, the crime, and the participants were the same in *Orfield* and in this case. We hold *Orfield* to be controlling authority and reject appellant's contentions on this issue.

Milligan next contends that there was ineffective assistance of counsel during the trial, penalty and appellate phases of this case. Appellant has failed, however, to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, Milligan's contention on this issue is without merit.

Finally, appellant argues that the death penalty as applied to him lacks proportionality and is cruel and unusual punish-

ment. We disagree. In Milligan's direct appeal to this court the issue of proportionality was addressed as follows:

> We have reviewed our other cases in which the sentence of death has been imposed to determine whether Milligan's sentence is disproportionate or excessive. Our review leads us to conclude that the sentence of death is neither disproportionate nor excessive.
>
> We also conclude from the record that the . . . [sentence] of death . . . [was] not imposed under the influence of passion, prejudice or any arbitrary factor.

Milligan v. State, 101 Nev. 627, 639, 708 P.2d 289, 296-97 (1985). These statements are now the law of the case.

Appellant's contentions lacking merit, we hereby ORDER this appeal dismissed.

/s/_____, C.J.
Mowbray

/s/_____, J.
Springer

/s/_____, J.
Rose

/s/_____, J.
Steffen

/s/_____, D.J.[1]
Ames

[1]The Honorable Jack B. Ames, Judge of the Fourth Judicial District Court, was designated by the Governor to sit in place of the Honorable Cliff Young, Justice. Nev. Const. art. 6, §4.

cc: Hon. Llewellyn A.Young, Judge
Hon. Frankie Sue Del Papa, Attorney General
David Sarnowski, Deputy Attorney General;
William H. Smith
Annette R. Quintana
Susan Harrer, Clerk

File No. 2289-1 & 2289-2

FILED
'90 SEP 14 A10:23
SUSAN W. HARRER
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT

RONNIE MILLIGAN, Plaintiff,	)	
vs.	)	**DECISION**
THE STATE OF NEVADA, Defendant.	)	
GEORGE SUMNER, DIRECTOR NEVADA DEPARTMENT OF PRISONS, Respondent.	)	

Petitioner was arrested on the 4th of July, 1980, in Humboldt County, Nevada, and charged with the crimes of Murder and Robbery With the Use of a Deadly Weapon on a person over 65 years. (ROA [Record on Appeal] Vol. I, p. 5-10, and Vol II, p. 270-273.) Ramon Houston, a witness, was kept in custody pursuant to a material witness order. Thereafter, a preliminary hearing was held. A pretrial hearing on motions was held on January 6, 1981. Attorneys for Petitioner filed numerous motions and the individual voir dire consumed three and one-half days through January 13, 1981. (*Id.*, Vol. III.) The trial was held during a seven-day period from January 13 to January 22, 1981. (*Id.*, IV-V.) Petitioner was found guilty of First Degree Murder and Robbery With the Use of a Deadly Weapon on January 22, 1981. (*Id.* Vol. V, p. 280.) The penal-

ty hearing was conducted on January 27, 1981, and the jury set the penalty at death (*Id.*, Vol. VI, p. 137.)

The original trial attorneys, Tom Perkins, Tony Axam and Virginia Shane, for Petitioner withdrew and were replaced by John Conner, Esq., on July 20, 1981. (UId., Vol. I, p. 164-165.) On that day, new counsel filed a motion for new trial and a motion to strike the death penalty. The motions were heard on July 20, 1981. (*Id.*, Vol. III, p. 3.) Counsel for Petitioner argued that the underlying felony could not be used as an aggravating circumstance in the penalty hearing if Petitioner were guilty of felony murder. (ROA Vol. III, p. 107-11.) Counsel also contended that the voir dire was deficient (ROA Vol. III, p. 122-124), there was prosecutor misconduct (ROA Vol. III, p. 113-116), evidence was destroyed (ROA Vol. III, p. 126-129, and the penalty instructions, procedure and argument were improper (ROA Vol. III, p. 130-138. The motions were denied. (ROA Vol. III, p. 162-167).

Petitioner was formally sentenced on August 3, 1981, and the Judgment of Conviction was filed on August 17, 1981. (*Id.*, Vol. I, p. 268-269.) The court imposed a sentence of death and two consecutive fifteen-year sentences for the crime of Robbery With a Deadly Weapon with the latter sentences to run concurrent to the death penalty. (*Id.*, Vol. VII, p. 34).) The court denied the motion by the state to enhance the sentence because the victim was over sixty-five years of age. (ROA Vol. VII, p. 3-16.) An Order for Stay of Execution was filed on August 17, 1981. (*Id.*, Vol. I, p. 270.)

Petitioner filed notices of appeal on August 28 and September 8, 1981. (ROA Vol. I, p. 271-74.) Appellant's Opening Brief and Excerpts of Record were filed on February 25, 1983, after several extensions of time. Due to the fact that the newly-elected Humboldt County District Attorney, Virginia Shane, was trial counsel for Petitioner, the Attorney

General was requested to represent the State of Nevada on appeal on March 1, 1983. The Respondent's Answering Brief was filed on May 20, 1983. On the 28th day of October, 1985, the Nevada Supreme Court issued its decision on the direct appeal. See *Milligan v. State*, 101 Nev. 627, 708 P.2d 289 (1985). The court affirmed the convictions. That decision was ultimately appealed to the United States Supreme Court. Certiorari was denied on October 6, 1986. Thereafter, remittur issued and this petition was filed on the 13th day of May, 1987. Trial on the issues was held on the 19th, 20th and 21st day of September, 1988.

The Petitioner herein filed a Petition for Post-Conviction Relief in effect challenging the effectiveness of his attorney. A hearing was held on September 19, 20 and 21, 1988. Briefs were prepared and submitted to this court for decision.

Petitioner raised four major issues:

1. Was there a denial of effective assistance of counsel at trial?
2. Was Houston an accomplice?
3. Credibility of expert opinion on lack of effectiveness.
4. Was Petitioner's punishment disproportionate, excessive, cruel and unusual punishment?

The applicable law pertaining to these issues is set forth in *Strickland v. Washington*, 80 LEd2d 674, 694. In that decision the court stated:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at

the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' See *Michael v. Louisiana*, supra at 101, 100 LEd 83, 76 S Ct. 158. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

The court goes on to state:

Thus a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, view as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

1.) **Was there a denial of effective assistance of counsel at trial?**

The defendant has raised ten (10) sub-issues of alleged ineffectiveness of counsel.

a. Lackk of experience, preparation and plan.

b. Failure to take interlocutory appeal.

c. No theory of defense.

d. Failure to use impeaching evidence.

e. Absence of one of trial counsel at penalty phase.

f. Summation by inexperienced attorney.

g. Petitioner did not testify at penalty phase.

h. Rejection of Bonnette testimony.

i. Rejection of Accomplice Corroboration issue.

j. Destruction of evidence on Houston's clothes.

a.) **Lack of experience, preparation and plan of defense:**

The petitioner contends that his attorneys were inexperienced, at least Tom Perkins was inexperienced. At the time of this crime on July 4, 1980, Tom Perkins was the Public Defender for the Counties of Pershing, Lander and Humboldt Counties. He was also co-counsel on a murder case in White Pine County. This court has no control over how an attorney is hired by the Public Defender's office but would presume that an interview would have been had by the person hiring Mr. Perkins and it is reasonable to assume that Mr. Perkins had the necessary qualifications as she was hired by the Public Defender's office to take over the duties of being Public Defender when Mr. Perkins left. The court does not know

whether Ms. Shane was to have all three counties or not. The Public Defender's office changes the areas in which their employees work without consultatoin with the courts.

Tom Perkins had been Public Defender for about 15 months and had disposed of approximately 150 cases including misdemeanors and felonies. When he was appointed to represent petitioner herein, he had a case load of approximately 85 cases when Ms. Shane took over the Public Defender's office. The court was well aware that Ms. Shane had had very little trial experience but because she was the incoming Public Defender and this was a deathy penalty case, the court ordered that she sit in as an assistant counsel so she could get some experience in this type of case as long as she was going to be in the District for a period of time.

Tony Axam, the third member of the defense team, was a lawyer from Atlanta, Georgia, and had been very successful defending defendants in some 50 death penalty cases. His practice had taken him into many states. Petitioner or Defendant (the terms are used interchangeably herein) thus had attorneys with very little experience, some experience and a lot of experience.

It is true that the Public Defender's office in Winnemucca did not have an investigator. In most cases one was not needed as the District Attorney's office had an "open file policy" so that the Defendant's attorneys had access to every bit of information that the prosecutor's office had. In those exceptional cases where an investigator was believed to be necessary the Public Defender's office could always petition the court for money to defray the cost of the investigator.

No request was made in this case for an investigator. The court can only conclude that the defense was satisfied with the information they received from the prosecutor's office.

While the Public Defender's office showed that when Ms. Shane took over there were some 85 cases in the files in the office, the Public Defender's office was able to "plea bargain" many of the cases during this period of time. The court does not wish to leave the reader with the thought that there were 85 cases scheduled for jury trial.

Whether Tom Perkins was overburdened as the defense suggests is open to question. The court, of course, knows he was busy. Tom Perkins was an excellent attorney and settled many cases in a very expeditious manner

There are four specific items alleged that Tom Perkins did not do:

1. Perkins did not request the court to appoint an investigator.

2. Perkins did not investigte Ramon Houston.

3. Perkins did not seek an independent analysis of Houston's clothing.

4. Perkins did not impeach Houston by use of blood on Houston's clothing.

The Public Defender's office had access to the prosecutor's files. The Public Defender's office thus had access to all information that the State possessed. The defense indicates that the Public Defender's office should have investigated Ramon Houston. The state provided information to the Public Defender's office that Ramon Houston was a criminal and not an esteemed person admired by all. Houston admitted on the witness stand (ROA Vol. IV, p. 66-67) that he had been put in jail in Mexico for stealing a pig. He also testified that he had been put in jail in Mexico for stabbing a detective. On cross-examination (ROA Vol. IV., p. 191), it was brought out that Ramon Houston also went to jail in San Antonio, Texas,

for stealing. It is not apparent to this court, and the defense has failed to point out, how the gathering of information on Ramon Houston by an investigator beyond what was already known could have helped the Defendant. It must be noted that this is a strict requirement of *Strickland*.

Would an independent analysis of Ramon Houston's clothing have added anything to the evidence the jury already had? First, Ramon Houston testified that he was at the crime scene when the crimes were being perpetrated. He was an eye witness. He even testified about the distances between the parties involved and his relationship distance wise to the crime scene. Ramon Houston even drew a diagram for the jury showing the relationship of the parties (ROA Vol. IV, p. 91-96). Thus, information was provided to the jury so that they could evaluate the pattern of blood splattering when the hammer blows were struck on the victim's head. Only three of the defendants, Hale, Bonnette and Orfield, had some human blood on their clothes. There was no human blood on the clothes of either Milligan or Houston (ROA Vol. IV, p. 477). Houston's clothes did, however, test presumptively for blood (ROA Vol. IV, p. 470). The defense contends that the blood had been washed out of Houston's pants by jail employees and, therefore, they were prevented from establishing that Houston had human blood on his pants. The jury was made aware of the fact that Houston's pants had been laundered (ROA Vol. IV, p. 479-480).

The Defendant alleges that Perkins should have used the blood on Houston's clothes to impeach him. The court is unaware of how blood on Houston's clothes or his shoes could be used to impeach Houston as he freely admits being at the scene of the crime. Houston drew a diagram showing the position of the parties. All blood on Houston's clothes or shoes can show is that he was at the scene of the crime. At the trial

the evidence did not show any blood on Milligan's clothes, or on Houston's clothes, or on little Kathy's clothes. It did show blood, however, on Hale, Bonnette and Orfield's clothes. Thus, it can be seen that blood or lack of blood on the clothes of a person does not necessarily show that the person had anything to do with the crime. Such evidence only shows that the person with blood on his clothes was present. Absence of blood on a person's clothes does not necessarily mean that that person wasn't present either. The only conclusion that can be drawn from the fact that a person has blood on his or her clothes or shoes is that they were present at the scene, as in this case when the hammer blows were struck. It does not show participation in the crime.

The original defense team was not ineffective when they did not try to impeach Houston as suggested by Defendant.

b.) **Defendant contends that the original defense team was ineffective because they did not take the interlocutory appeal permitted by law.**

This raises an interesting issue. The Federal Constitution in Amendment VI states "That in all criminal actions, the accused shall enjoy the right to a speedy and public trial . . . .

To supplement this Constitutional Amendment the State of Nevada has enacted the following statute, NRS 174.511, which reads as follows:

> Rights of state to trial within 60 days after arraignment. The state, upon demand, has the right to a trial of the defendant within 60 days after his arraignment. The Court may postpone the trial
>
> 1. It finds that more time is needed by the defendant to prepare his defense; or

> 2. The number of other cases pending in the court prohibits the acceptance of the case for trial within that time.

The law in effect at the time of the Milligan case was that, if there were a pre-trial publicity matter, the defendant could move for an interlocutory appeal after the jury was impanelled challenging the District Court's decision to proceed with the seated jury panel. The Supreme Court did not adopt an accelerated calendaring procedure for this type of case, and it was put on the regular calendar. In some cases the matter was in the Supreme Court for nearly a year and a half before the matter was returned to the District Court for continuing the trials. The time lost by the interlocutory appeal procedure in effect negated the Constitutional Amendment and NRS 174.511.

In some cases defendant likes to delay his trial as much as possible hoping that a witness might disappear. That was not a concern in this case, however, because Ramon Houston was retained in jail as a material witness. Also he had testified at the preliminary hearing and his testimony was on the recorded transcript of the preliminary hearing.

Shane testified that she and Perkins, with the assistance of Bennett, had the best jury possible in Winnemucca (PCR Tr. p. 362). When the jury had been selected, the defense waived its last three peremptory challenges.

When Perkins was asked why he didn't take the interlocutory appeal, he stated:

> That we started working together (after Kathy Bennett, the psychologist who helped in jury selection, and Tony Axam, associate counsel, had approved) and thinking that we had a lot of momentum that we were . , . that we had control of the

litigation for some reason and I think that in a general sense be why we did not do that." (PCR Tr. p. 39.)

In view of the aforegoing it is this court's opinion that the decision to not take the interlocutory appeal was a strategic decision and does not show ineffectiveness of counsel.

c.) **Defendant alleges that his counsel had no theory of defense.**

In Defendant's opening statements defense counsel Perkins indicated that the defense was primarily that Milligan was an alcoholic. The testimony from the Post-Conviction Relief Hearing indicates Perkins' theory of defense and reads as follows:

Q There is an allegation in the Amended Petition for Post Conviction Relief that attacks the decision to present an alcohol defense.

Do you recall the allegations?

A Not with particularity, but in general terms, yes.

Q That's fine.

Is it a correct conclusion to make that you and the trial team felt that that was the best defense for Mr. Milligan?

A Yes.

Q Would you go so far as to say that it was the only defense for Mr. Milligan?

A No.

Q Tell us, if you can if you remember, what factors lead you to the conclusion to present the defense that you did?

A Well, although we didn't have a blood alcohol we did have evidence that he was drunk.

It was inconsistent with his character and his behavior on other occasions. It separated him out from — It had — It sounded true. It rang true.

Q Would you agree that that decision to present that defense was a product of considerable discussions and deliberations on your part as well as the other members of the trial team and Mr. Milligan?

A No.

The decision was made before they came into the case. We were flexible enough to integrate some other evidence, but I think that Mr. Milligan and I recognized that that is what his defense was early on.

Q Was that decision a product of discussions between you and Mr. Milligan?

A Well, he certainly participated in the discussions and the decision-making, but it had a lot to do with the evidence and the other things lthat I have mentioned.

Q So based upon the totality of the information you had available at that time you believed that was the best defense available?

A Yes.

Q At trial on the alcohol defense I believe the defense team employed a physician by the name of Doctor Chapel; is that correct?

A Yes.

Q I believe you had Mr. Milligan transported to the University of Nevada Reno somewhere up at the

school, I don't know exactly where, for the purposes of conducting an alcohol experiment?

A That is correct.

Q Would you tell the Court and kind of refresh the Court's memory on what that experiment was all about?

A It was an attempt to try to see if we could recapture Mr. Milligan's memory of the events.

Q Was an attempt to try to see if we could recapture Mr. Milligan's memory of the events.

Q Was that successful?

A No.

Q Did Doctor Chapel testify in the trial phase?

A Yes.

Q Did he explain to the jury the blackout concept that was the focal point of your defense?

A Yes.

Q Do you feel that he explained that theory of defense in a clear and concise manner?

A I don't know.

Q Did you feel it was clear and concise at the end of your presentation?

A Clear and concise is not an adjective that rides very well on Doctor Chapel's back.

Q You're probably right on that one.

A Certainly I think the ideas were communicated very well.

Q At the conclusion of his testimony did you feel that you had presented all of the matters of defense that you wished to have presented through Doctor Chapel?

A Yes. (PCR Tx., p. 128-131.)

Defendant now suggests that his counsel should have raised the fact that Houston was an accomplice and, therefore, his testimony was unbelievable. The court has discussed this theory in more detail hereinafter and the reader is referred to these later paragraphs for conclusions why the accomplice theory was not a viable defense.

Defendant has not offered with particularity any defense that the court can determine would change the outcome of the case. The court here believes that the original defense team used the only viable defense available. The court does not find that the defense team was ineffective in regard to the subject matter of this paragraph.

d.) **The Defendant alleges that his defense team failed to use vital impeaching evidence.**

For a detailed decision of this issue, refer to paragraph 2. Briefly, Defendant alleges his original lawyer did not make an independent investigation of Ramon Houston. It was known and the information was given to the jury that Ramon Houston was a felon. Defendant does not show what information might have been available or how it would change the outcome of the trial. An instruction on an accomplice whether asked for by Perkins or not was given to the jury. This was Instruction 17. For further discussion of this instruction, see paragraph 2 herein. Defendant raises the issue that the state had destroyed evidence; i.e. laundering of Ramon Houston's pants after he was booked.

Where a defendant seeks to have his conviction reversed for loss of evidence, he must show either bad faith or connivance on the part of the government or prejudice by the loss of evidence. *Wood v. Crocket*, 97 Nev. 363, 632 P2d 339 (1981); *Crocket v. State*, 95 Nev. 859, 603 P2d 1078 (1979); *Rogers v. State*, 101 Nev. 475, 705 P2d 664.

There is no testimony in this case that would indicate law enforcement in anyway connived or used bad faith in washing Ramon Houston's pants. Ramon Houston's shoes are still available and they have blood stains on them.

Defendant has not demonstrated how the laundering of Ramon Houston's pants has prejudiced Defendant's case when the shoes are still available. As pointed out in detail hereinafter, the blood on the shoes or the pants only show that Ramon Houston was present in the vicinity of the crime scene and does not show that he participated in the crimes.

The court does not find that the defense counsel were ineffective because of their handling of the subject matter covered in this paragraph.

e.) **Defendant alleges that his defense team did not have experienced counsel at the penalty phase.**

Petitioner alleges that the absence of Axam for the penalty phase was in some manner wrong. He alleges the matters that allegedly were discussed but does not allege or even suggest how he was prejudiced. Neither Axam nor Perkins now remember why Axam was not present. Yet, Perkins announced the reason in his closing arguments; i.e. that Axam had another hearing on that day (ROA Vol. III, p. 4).

Mr. Axam did argue to the jury in the guilt phase, and the jury brought in a verdict of guilty of murder in the first degree.

The Defendant has the burden of showing how the outcome of the case would have changed even if Axam were present and argued to the jury.

The court does not find that the defense counsel were ineffective because Mr. Axam was not present to argue at the penalty phase.

f.) **Summation by wholly inexperienced attorney.**

Petitioner alleges that Ms. Shane's closing argument on his behalf was somehow deficient due to her inexperience. Once again broad allegations are made without a showing of how Petitioner was prejudiced.

Ms. Shane's closing argument was a mixture of passion and a showing of the mitigating circumstances. Her plea was that an eye for an eye merely perpetuates the killing (ROA Vol. IV, p. 24). Following Shane, Perkins gave a lengthy argument focusing on many points, particularly the balancing of aggravating vs. mitigating circumstances.

Defendant has failed to refer to any standards that set forth what an attorney is supposed to say or the minimum points that should be covered by an attorney in his arguments to a jury. Nor can Defendant point to any area that if discussed in a different manner on any subject if not discussed could have been discussed that would affect the outcome of the trial.

This court cannot find that the defense counsel were ineffective because Ms. Shane argued to the jury.

g.) **Defendant did not testify at penalty phase.**

Petitioner alleges that it was deficient on his attorney's part to not call him to testify at the penalty phase. No prejudice is

argued nor alleged.

Perkins testified as follows regarding the issue of why Milligan did not testify at the penalty phase:

> Q Was the reason that he did not testify because you felt that you had presented everything that you could have presented through his testimony at the guilt phase?
>
> A That was the major thing.
>
> Q And that —
>
> A The only thing that he was extremely disappointed with their verdict and —
>
> Q Naturally so.
>
> A — and I think quite frankly I was afraid that he would lash out at the jury because he was so disappointed with their decision.
>
> Q So that was one factor in your decision not to put him on?
>
> A Yes.
>
> Q Can you recall any other factors that you can share with us?
>
> A See, I don't think he would have lashed out.
>
> When he controls his emotions he comes off as being kind of wooden and we didn't want to show that. He showed some good emotion during his direct examination.
>
> Q Were there any other factors that you recall influencing that desicion?

A Not that I can remember. (PCR Tx., p. 120, l. 8 - p. 121, l. 8.)

Whether a defendant takes the stand to testify or not is entirely up to the Defendant. The right of the Defendant to testify or not testify is covered by both the Nevada State and Federal Constitutions. In this case the defendant chose not to testify. This court can only conclude that he did not testify in this case because of some strategical reason. The court cannot find that this was ineffectiveness of counsel.

h.) **Rejection of exculpatory, mitigating evidence.**

Petitioner alleges that his trial attorneys were deficient in not calling Bonnette to the stand in either the guilt or penalty phase.

Q . . . Let's take the Bonet (sic) situation. Is it fair to conclude that based upon what you knew that you felt that Bonet's testimony at either the fact finding guilt phase or the penalty phase would have done Mr. Milligan more harm than good?''

A I just have to repeat. I have repeat what I said about the penalty phase.

I did not reconsider whether to call Mr. Bonet at the penalty phase. So the only time we considered calling him was during the guilt phase and I — The decision that was made was based upon the prior inconsistent statements and also the fact of control.

Q Let's talk about that for just a moment.

The prior inconsistent statement is the statement that Mr. Bonet gave to law enforcement shortly after his arrest; is that correct?

A My answer was in the plural. I think he had given a number of statements.

A To your knowledge there was more than one statement that he gave to law enforcement then?

A Right.

Q Each of those statements, they were inconsistent with each other; is that correct?

A With what?

BY MR. BULLOCK:

Q Inconsistent with each other.

A I can't remember the contents.

It's my recollection that they were inconsistent.

Q Were the contents also inconsistent with what Bonet had told you in your interview with him that you have already spoken about?

A Yes.

THE COURT: Those statements were never put in evidence, were they?

MR. BULLOCK: Not in the Milligan trial, your Honor

THE COURT: No, I didn't think so. That is why I was wondering.

BY MR. BULLOCK:

Q Those three statements were inconsistent with what he told you in your verbal conversation with him?

THE COURT: Do we have copies of those now?

MR. BULLOCK: Yes, sir.

THE COURT: Would you put them in evidence?

MR. BULLOCK: I would be happy to, your Honor.

Would you like to do that now or would you like to do during the course of events?

THE COURT: You can do it when you get them ready.

MR. BULLOCK: Thank you.

BY MR. BULLOCK:

Q I believe the question was they were inconsistent with the time that you had the verbal conversation with Mr. Bonet?

A I felt Mr. Bonet was telling the truth down in the jail and it was one of the situations where I yielded decision making to co-counsel and because I felt — I had the ultimate responsibility for those decisions.

I probably should have decided — I'm not saying it would have made any difference. I don't know if it would have or not.

I thought he was telling the truth and I thought it was very powerful and I don't know why that hasn't been recognized by the authorities either.

Q Well, regardless of the fact that you felt he was telling the truth, you were faced with the dilemma that if you put him on the stand he faced potential, substantial impeachment over those prior statements?

A That's correct.

Q And based upon that were you not afraid that the jury would only believe one portion of his testimony i.e., that Mr. Milligan swung the hammer that delivered the fatal blow and would not believe the rest of his testimony?

A That was the down side of putting him on the stand. (PCR Tx., p. 90, l. 11 — p. 93, l. 19.)

The reason for not using Bonnette's testimony was that he told so many different stories that it was hard to determine which was the correct one. Not calling Bonnette appears to be a strategic choice decision.

The court does not find that this shows ineffectiveness of counsel.

i.) **Rejection of issue of accomplice corroboration.**

Petitioner alleges that it was deficient for his trial team to not argue Houston as an accomplice.

The trial court did in fact give an appropriate Accomplice Corroboration instruction. See ROA Vol. V, p. 185, Instruction Number 17. Perkins did argue the accomplice instruction (ROA Vol. V, p. 233, l. 9 — p. 234, l. 10). Mr. Axam even argued the fact of Houston being an accomplice (ROA Vol. V., p. 246, l. 14-21 and p. 247, l. 18-22). Axam further talked about how he felt Houston was a liar and specifically addressed the accommplice issue. See ROA Vol. V, p. 253-256 and p. 271. It, therefore, does not appear that the accomplice corroboration issue was totally rejected.

The court has gone into great detail concerning the accomplice issue in Paragraph 2 herein.

Because the defense team alluded to the accomplice issue, and the court gave Instruction 17, and for the reasons set forth

in Paragraph 2, this court cannot find that defense counsel were ineffective in their handling of the defense on this issue.

j.) **Damaging of evidence of Houston's participation in murder.**

Petitioner next claims that Perkins' failure to investigate the status of Houston's clothing and to use the blood on the boot is deficient conduct which prejudiced Petition by his not being able to prove Houston's complicity in the murder.

First, the matter of Houston's clothes being washed was produced before the jury and commented upon by Axam in closing arguments of the guilt phase. See ROA Vol. V, p. 262, l. 25-28. And second, the blood on the boots of Houston would establish his complicity just as easily as the blood on the clothing.

Houston's own testimony showed that he was at the scene of the crime. What better testimony can there be than that? The jury could have rejected his entire testimony if they so desired. Apparently they accepted his testimony. The presence or absence of blood on shoes and clothing and what it means is gone into greater detail in Paragraph 2.

In view of the discussion herein and the discussion in Paragraph 2, this court cannot find that defense counsel were ineffective in handling this matter.

2. **Was Ramon Houston an accomplice?**

An accomplice is defined as one who is liable to prosecution for the identical offenses charged against the defendant on trial in the cause in which the testimony of the accomplice is given. (NRS 175.291.)

Looking at the facts it is possible to initially conclude that Houston may have been an accomplice. If one were to assume that Houston had blood on his shoes and pants and had the victim's Social Security card and Golden Pass card in his possession, one might conclude that Houston had some complicity in the robbery and murder of Mrs. Voiniski. These facts would probably be sufficient to show a prima facia case against Houston. Houston, however, gave statements and had a course of conduct after the crime that overcomes this prima facia case. For example. Houston testified that he picked up the Social Security card and the Golden Pass card at the scene of the crime. The testimony further showed that Terry Bonnette and Mrs. Orfield were rummaging through the victim's purse after it had been taken from her and these two cards dropped to the ground and were not retrieved by either Orfield or Bonnette.

The blood on Houston's pants and shoes simply show that Houston was present at the scene, not that he participated in the crime action. Even Milligan's clothes do not have any bloodstains on them (ROA Vol. IV, P. 477). The best testimony that Houston was at the scene comes from his own testimony. He was an eye witness. He testified that when Bonnette stopped the car, Leon got out of the back seat on the driver's side of the car, walked around the back, then towards the front of the car; and when he approached the front passenger seat, he opened the door and got the victim, Mrs. Voiniski, to get out. Leon and the victim then walked a few steps away from the card, and then Leon started hitting the victim about the head with a screw driver causing the victim to bleed. Shortly after Leon got the victim out of the car, Houston exited from the back seat of the car, on the same side of the car as were the victim and Leon. Houston was only a few feet away from the action and moved to the back end of the car, still only a few feet from the scene of action.

About this time Milligan hit the victim, who was lying on the ground, at least two times on the head with a 12-pound sledgehammer. It can be inferred that the first blow to the victim's head caused additional bleeding as the victim's skull was crushed; and when the second blow was struck, this undoubtedly caused blood to splatter all over the area. Human blood was found only on the clothes of Hale, Bonnette and Orfield. The first blow with the hammer may also have splattered blood over the area. The fact that Houston may have had blood on his shoes and pants only means that when the blood splattered he happened to be in the zone or area where blood was splattered. It does show, however, that Houston was present at the crime scene. It does not show that Houston committed any crime.

The aforegoing evidence is all the evidence before the court regarding Ramon Houston's complicity in the slaying and robbery of Mrs. Voniski.

In a companion case, State v. Orfield, Terry Bonnette testified that Ramon Houston had kicked the victim causing her to fall down. Terry Bonnette did not testify in the instant case. He had given several statements to law enforcement officers, and Tom Perkins interviewed Bonnette, and each statement was different. Apparently Milligan's attorneys felt that these different stories together with the fact that Bonnette would have to testify that Milligan swung the hammer that injured the victim would not advance their theory of the defense and so did not call him. It would appear to the court that this was a strategy decision.

The only evidence in the Milligan trial transcript that ties Ramon Houston into the crime in anyway would be the Golden Pass card and Social Security card. He picked these up from the ground after the purse was taken from the victim and the cards dropped to the ground while Orfield and Bonnette were

rummaging through the purse. In general an accessory after the fact is not generally regarded as an accomplice to the crime. *People v. Conrad*, 270 P2d 31, 125 C.A.2d 184; *People v. Sapp*, 118 N.E. 416, 282 Ill. 51; *State v. Lyons*, 175 N.W. 689, 144 Minn. 348; *Commonwealth v. Smith*, 495 A.2d 543, 343 Pa. Super 435; *State v. Bowan*, 70 P.2d 458, 92 Utah 540.

In general the burden of proving that a witness is an accomplice is on the party asserting it. *People v. Martinez*, 183 Cal. Rptr. 256, 132 C.A.3d 119; *People v. Rias*, 4 Dist. 210 Cal. Rptr. 271, 163 C.A.3d; *State v. Bixby*, 177 P.2d 689, 27 Wash. 2d 1144.

Knowledge that a crime is to be committed is essential in order to constitute one an accomplice and one not having such knowledge is not an accomplice to the crime *People v. Martinez*, 183 Ca. Rptr. 256, 132 CA3d 119; *State v. Harmon*, 340 P2d 128, 135 Mont. 227. During the ride from Valmy to Stonehouse, Ramon Houston testified he had the following conversation with Terry Bonnette (See-ROA Vol. IV, p. 183, l. 5):

> Q Okay. And then I understood from another hearing that you leaned forward at one point and asked Terry what was going on, is that correct?
>
> A Yes. I didn't lean forward because right in front of me was the front seat. I went to the side a little.
>
> Q Okay. You reached across to where?
>
> A Terry.
>
> Q And you asked Terry what was going on, right?
>
> A I wanted to ask him, 'Where are we going, what's going to happen,' or something like that.

Q Right, and you didn't ask Ron what was going to happen, did you?

A No.

Ramon also testified he knew very little English; and, if people talked too fast, he couldn't understand very much at all.

From the colloquy hereinbefore between Terry Bonnette and Ramon Houston and the fact that Ramon understood very little English, there is nothing in the record to show that Ramon Houston had any knowledge that a crime was about to be committed. An interpreter was used at all times Houston was in court.

In order for Ramon Houston to be an accomplice there must be some showing that he had the requisite intent to commit the crime of robbery and murder. A review of the record shows that he did not have the requisite intent at the time the crimes were committed. In no place in the record is there any evidence that Ramon Houston participated in the preparation of the crimes. On the ride to Valmy the evidence shows that Ramon Houston was asking Terry Bonnette "what was going on." This hardly seems to be the type of question a person would ask if a person knew what was going to happen.

At the scene of the crime, after the victim had been brutally assaulted, Ramon Houston testified, "I was wishing with all my heart for a police car or any other car to stop on the side of the road. None of this happened." (ROA Vol. IV, p. 92, l. 10-13.) This is hardly a statement of someone having the intent to commit a crime. True, this is Ramon Houston's testimony. This testimony, however, is all the testimony there is on the subject.

When Ramon Houston arrived at Golconda with the Defendant, Terry Bonnette, Leon Hale, Kathy Orfield and little Kathy, he left the group and went into the rest room of the

Waterhole Bar. Thereafter he went out the back window and was ultimately able to get help for the victim. This hardly seems like conduct that shows criminal intent. He could have gone along with the others and there is every likelihood that the group would not have been apprehended.

Preparation for a crime flight and conduct of a party after a crime may be utilized to determine a party's intent at the time of the crime. *Bullock v. State*, 36 Ala. App. 712, 63 So.2d 607; *State v. Smith*, 140 Meiss, 37 A2d 246; *State v. Kirch*, 322 NW2d 770; *State v. Kenley*, 693 SW2d79; *People v. Jackson*, 498 NYS2d 76; Izaquirre v. State, 695 SW2d 224.

Considering all of Ramon Houston's actions, it is believed that they show that he did not have the intent to commit the crimes for which the others were charged.

From the evidence adduced and the applicable law, it does not appear that Ramon Houston was an accomplice.

Assume for purposes of argument, however, that Ramon Houston was an accomplice as advanced by the Defendant. Does that preclude his testimony?

In general the competency of the testimony of an accomplice, codefendant, or particeps criminus who is a competent witness usually is governed by the same rules as apply to the testimony of other witnesses. *People v. Flood*, 182 P 766, 41 C.A. 373. In general he may give any competent and relevant testimony. *People v. Numath*, 98 NE2d 733, 409 Ill.; *State v. Bennett*, 76 SE2d 42, 237 N.C. 749; *Commonwealth v. Brown*, 44 A.2d 524, 158 Pa. Super 226.

Nevada law requires that the testimony of an accomplice should be received with great caution, and that the court should always so instruct the jury. The jury may disregard testimony of accomplice, but they are not bound to do so. They may

give to testimony of witness such credit as, in view of all circumstances, including corroborating evidence, they deem it entitled to. *State v. Storeler,* 20 Nev. 403, 22 Pac. 758; *State v. Williams,* 35 Nev. 276, 129 Pac. 37; *State v. Jukich,* 49 Nev. 217, 242 Pac. 590; *State v. Hilbish,* 59 Nev. 469, 97 P2d 435.

It is believed that the instruction, Instruction No. 17 (Trial Vol. III, p. 185-186), does exactly what the Supreme court requires, maybe not in the precise language but certainly as to intent. See *Howard v. State,* 102 Nev. 572.

Instruction No. 17 reads as follows:

"Number 17.
Accomplice must be corroborated.

> A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense or the circumstances thereof.
>
> An accomplice is one who is liable to prosecution for the identical offenses charged against the defendant on trial in the cause in which the testimony of the accomplice is given.
>
> If corroborated, the testimony of the accomplice must then be weighed together with all the other evidence, in determining whether the offenses have been proved beyond a reasonable doubt (Trial Vol. III, p. 185-186).

This instruction states that the accomplice's testimony must be corroborated. It then sets forth what an accomplice is and then states:

> If corroborated, the testimony of the accomplice must then be weighed together with all the other evidence, in determining whether the offenses have been proved beyond a reasonable doubt.

This instruction states that the jury must first find corroboration. Then the testimony of the accomplice is considered, and then the jury must determine if the accomplice's testimony, plus the other testimony, is sufficient to show a finding beyond a reasonable doubt.

With the exception of the expert witness testimony instruction, in no other instruction is there such a red flag regarding a witness' testimony. *Buckley v. State,* 95 Nev. 602, states that a precautionary instruction need only be given if the accomplice's testimony is uncorroborated.

Generally an accomplice's testimony is admissible nothwithstanding the fact the testimony is procured by a grant of immunity from prosecution. *People v. Todd,* 346 P2d 529, 175 C.A.2d 508; *Vires v. Commonwealth,* 230 S.W.2d 455, 313 Ky. 106; *Hoke v. State,* 98 So.2d 886, 232 Miss. 329; *State v. White,* 126 S.W.2d 234.

In the instant case when Ramon Houston was given a grant of immunity by the court on October 20, 1980. After this grant of immunity had been given, the State had no control over the type of testimony that Ramon Houston would give. He could have changed his story one hundred and eighty degrees and the State would have been bound by it. Fortunately for the State, Ramon Houston did not change his testimony to any great extent.

The word "corroboration" in connection with accomplice testimony denotes a strengthening or confirming. It is essentially a relative term and refers to some antecedent which it

is said to strengthen or fortify. The term "corroborate," when used in this connection, has been said to mean, in its legal significance, to strengthen not necessarily the proof of any specific fact as to which the accomplice has testified but the probative, criminating force of his testimony. 23 CJS 273 Sec. 1011.

Generally, corroboration must be as to some material fact or facts which will strengthen the testimony of the accomplice. *Hubbard v. State,* 45 So.2d 795, 35 Ala. App. 211. However, it is not necessary that the accomplice should be corroborated with respect to every fact, detail or particular as to which he testifies, nor is it necessary that corroboration should extend to or establish all the elements of the offense. Likewise, the corroborating evidence need not establish or refer to the precise facts, or any precise or particular statement or fact testified to by the accomplice.

Corroboration may be but of a single act, but under other authority, no single isolated act is sufficient.

The jury is justified in believing any part of the accomplice's testimony which is corroborated by other and independent evidence. If the accomplice is corroborated in part, or as to some material fact or facts, tending to connect accused with the crime, or the commission thereof, this is sufficient to authorize an inference by the jury that he has testified truthfully even with respect to matters as to which he has not been corroborated and, thus, sustain a conviction. 23 CJS 277, Sec. 1015.

The tendency of the corroborative evidence to connect accused with the crime, or commission thereof, must be independent and without the aid of any testimony of the accomplice. *State v. Bagby,* 316 P2d 941, 83 Ariz. 83; *People v. Brown,* 320 P2d 5, 49 C2d 577; *State v. Deschamps,* 168 P2d 335,

118 Mont. 566; *State v. Woodell*, 305 P2d 473, 6 Utah 2d 8. In other words, the corroborative evidence may not depend for its weight and probative value on the tesitmony of the accomplice (*People v. Patenza*, 459 NYS2d 639, 92 AD2d 21), and it is insufficient if it tends to connect accused with the offense only when given direction or interpreted by, and read in conjunction with, the testimony of the accomplice. *People v. Lyons*, 324 P2d 556, 50 C.2d 245; *People v. Pauley*, 119 NYS2d 152, 281 A.D. 223.

Proof that the accused was at or near the scene of the crime at or about the time of its commission is admissible in corroboration of the testimony of the accomplice and may tend to connect accused with the commission of the crime, so as to furnish sufficient corroboration to support a conviction when coupled with suspicious circumstances. *State v. Jones*, 26 P2d 341, 95 Mont. 317; *Oliver v. State*, 454 A.2d 856, 53 Md. App. 490; *State v. Star*, 81 N.W.2d 94, 248 Minn. 571; *State v. Estabrook*, 91 P2d 838, 162 Ore. 476.

In the instant case a hair approximately 5¾ inches long was found on one of the shoes of Defendant; and when David Atkinson, a criminologist, was asked:

> Q Do you have an opinon as to how it compares with the head hair of the victim you plucked in the hospital?
>
> A Yes.
>
> Q What is that opinion?
>
> A On the basis of those same examinations of comparison, the same similarities are there. In all the things I related before, its color, pigment and all the other characteristics, the sample from the shoe is the same as the three white hairs that I got from the victim. (ROA Vol. IV, p. 493).

With regard to blood on the shoes of Milligan, Richard Berger, a Reno Police Department criminologist, testified:

> I did, however, obtain positive results in a presumptive test for blood from spots on the toe of both shoes. (ROA Vol. IV, p. 465.)

At the scene of the arrest Defendant and Orfield, Bonette and Hale had constructive possession of the victim's Volkswagon.

It appears to the court that the hair and blood exhibits show that Defendant was at the scene of the crime. The presence of the victim's purse near the car where Defendant was standing at Golconda and constructive possession of the Volkswagon establishes a prima facia case agains Defendant. The court realizes that the State has the burden of proving all the elements of the various crimes beyond a reasonable doubt; but when the State makes its prima facia showing, the Defendant does have to go forward with the evidence to refute the prima facia case or else suffer the consequences. In the case of Ramon Huston, he gave a satisfactory explanation of the course of action he took and in essence overcame the prima facia case at least to the point the State did not think it had a case against him. Defendant Milligan did not provide sufficient evidence that gave a satisfactory explanation of his actions that led to the death of the victim.

The hair on the Defendant's shoe, the presumptive test showing blood on the toe of the Defendant's shoe, the nearness of the victim's purse to Defendant at the arrest scene and the constructive possession of the victim's Volkswagon do tend to tie Defendant into the crimes charged against him. All of these facts are independent of any testimony by Ramon Houston, the alleged accomplice. It would, therefore, appear that even if Ramon Houston were an accomplice in view of

the law set forth herein, his testimony would be admissible in evidence against the Defendant.

3.) **Credibility of expert opinion on lack of effectiveness.**

Mr. George Franzen testified to an extensive background in criminal defense, including some 30-40 murder cases. The death penalty was returned in only four cases. Mr. Franzen further testified that the defense in this case, in its totality, at both the guilt and penalty phases, fell below the applicable standard of *Strickland v. Washington, supra*.Mr. Franzen set forth thirteen reasons why he reached his conclusion:

1. Perkins should have hired an investigator to investigate Houston.

2. Perkins should not have overlooked the basic requirement that accomplice testimony be corroborated.

3. Perkins should have filed defense motions for discovery despite the "open file" policy of the District Attorney.

4. Perkins should have taken an interlocutory appeal.

5. During the appeal, defense could have completed their investigation and preparation for trial.

6. Conner should have raised the issue of lack of corroboration on appeal.

7. Perkins was ineffective for not impeaching Houston with evidence of the blood on his boots and clothing.

8. Defense should have obtained independent, impartial documents and witnesses to corroborate Milligan's early life.

9. Perkins should not have rejected the testimony of Bonnette.

10. Axam should have been present as experienced counsel to argue at the penalty phase.

11. Defense should have had a plan of operation developed before trial, including final arguments.

12. Milligan should have been presented to the jury at the penalty hearing.

13. Defendant should have been informed of his right to plead guilty and have his fate determined by a three-judge panel.

Most of these issues have been discussed hereinbefore with the finding of the court. Paragraphs 1, 2, 3, 4, 5 and 7 have been discussed very extensively.

With regard to Paragraph 6 the court cannot find that Conner was ineffective in not raising the issue of lack of accomplice corroboration. The court has discussed in great detail (a) that Houston was not an accomplice and (b) even if he were an accomplice, his testimony would still have been admissible. In view of this discussion, the court can only conclude that Conner was not ineffective because he did not raise the accomplice issue. Further the accomplice issue has been pretty well put to rest in the case of *Orfield v. State*, 105 Nev. Advance Opinion 22.

In Paragraph 8 Franzen indicates Perkins should have obtained independent, impartial documents and witnesses to corroborate Milligan's early life. If some document or a witness

exists that could provide exculpatory evidence, such evidence should have been produced. Evidence on Milligan's prior life; i.e. his good qualities, was unrefuted. The jury had this information. If any witness or documents exist that could change the outcome of the case, it should have been produced. Because no such document or witness has been produced showing how the outcome of the case can be changed, the court can only conclude that none exists.

Defense contends that Perkins should not have rejected Bonnette's testimony. Bonnette had made several statements to law enforcement personnel and had an interview with Perkins. Each time Bonnette talked, he gave a different statement. Perkins was faced with this situation. He felt that Bonnette was telling the truth when he interviewed Bonnette but Perkins also realized that on cross-examination the different statements would be brought to the attention of the jury. Would Bonnette be considered a raving liar? Would this testimony help or hurt the defense? The court is certain that the experts are divided on this question. In hindsight one can say if Bonnette's testimony had been used the outcome of the case couldn't have been any worse.

Whether Axam's presence and participation in the argument at the Penalty Phase would have changed the outcome of the trial is questionable. An explanation that his absence was due to the fact that he had to be at another hearing was given to the jury. Axam gave a very forceful argument at the end of the Guilt Phase, yet the jury brought in a verdict of first degree murder.

Defendant argues that this counsel should have a plan of operation developed before trial, including final arguments. Defense counsel did have a plan. Prior to the trial, they called in people to serve as mock jurors. It has to be assumed that some information was given to the jurors so that they could

make a decision. This information certain could be the basis for final arguments. Also, defense counsel utilized an alcoholic defense as part of their plan.

Defense now contends that Milligan should have testified at the penalty hearing. This ia a matter between the Defendant and his counsel. Neither the prosecutor nor the court have any input in Defendant's decision to testify or not to testify. The court can only conclude that defense counsel acted properly.

It is true that Milligan could have plead guilty to first degree murder and then be sentenced by a three-judge panel. The court is not too sure that the Defendant would have fared any better in this situation or not. Courts tend to be more calloused than lay jurors because they hear cases day in and day out. Failure of defense counsel to discuss this issue with their client does not seem to the court grounds for reversal, particularly when the majority of such cases are tried before a jury. In the instant case, it is doubtful that Defendant could have made an intelligent admission of his guilt because his defense was that he had blacked out and could not recall anything surrounding the events. Franzen also testified that Milligan was not prejudiced because he was not advised he could go before a three-judge panel (PCR Tx., p. 426).

After a review of Mr. Franzen's opinion, the court cannot find that his views show that the original defense counsel or Mr. Conner were ineffective.

4.) **Was Petitioner's punishment disproportionate, excessive, cruel and unusual punishment?**

Defendant contends that his sentence is disproportionate, generally, with references to capital cases in Nevada and elsewhere.

The appeals of the cases of Milligan, Hale, Bonnette and Orfield were consolidated because they arose out of the same set of facts and raise some of the same issues.

In the Case of *Milligan v. State*, 101 Nev. 627 the Supreme Court stated:

> We have reviewed our other cases in which the sentence of death has been imposed to determine whether Milligan's sentence is disproportionate or excessive. our review leads us to conclude that the sentence of death is neither disproportionate nor excessive.

A review of the cases shows that the Milligan sentences are not disproportionate with Hale, Orfield and Bonnette. In these cases a jury determined that neither Hale, nor Orfield, nor Bonnette had the intent to kill the victim. Thus, in accordance with *Edmun v. Florida*, 73 LED2d 1140, they could not receive the death penalty as it is believed by this court that only "the triggerman" can receive the death penalty unless the others had the intent to commit murder.

This court has only checked Nevada cases involving murder and robbery to see if there is any disproportionation in the sentencing.

The first case coming to the attention of the court was *State vs. Sala*, 63 Nev. 671 (1946). Sala robbed the victim by hitting him with a ball peen hammer and a monkey wrench, causing three skull fractures that lead to the victim's death. This case was tried before a single judge and he imposed the death sentence.

In *Deutscher v. State*, 95 Nev. 669 (1979), a murder-robbery case, the victim had been beaten about the neck, face and head with an object that caused a skull fracture that measured 2¾

inches in diameter. This case was tried before a jury and a jury imposed the death sentence.

In *Boal v. State*, 787 P2d 391 (1990), the victim was robbed of $10.00 and stabbed to death. A three-judge panel imposed the death penalty.

In *State v. Mazzan*, 783 P2d 430, a jury found the defendant guilty of murdering his sleeping lady friend while committing robbery and sentenced the defendant to death.

While Mazzan and a friend were sitting at a bar in Las Vegas, he pulled out a gun and shot the bartender and a patron without having any idea why he did it. He told his friend to go get the cash out of the cash register. A three-panel judge sentenced defendant Mazzan to death. See also *State v. Wilson*, 101 Nev. 452; *Farmer v. State*, 101 Nev. 419.

For murder and grand larceny, Defendant has been sentenced to death by a jury. *Rogers vs. State*, 101 Nev. 457.

For other cases see *Bishop v. State*, 95 Nev. 511; *Gallego v. State*, 101 Nev. 782; *Wilson v. State*, 101 Nev. 452; *Miranda v. State*, 101 Nev. 561. Other cases involving murder in conjunction with crimes other than robbery were checked out but it is believed that they didn't add anything to the list already included here.

It is this court's finding that the sentence in this case is not disproportionate to the sentences imposed in other cases involving the death penalty.

The defendant has raised numerous issues that this court has attempted to answer. Many of these issues have heretofore been presented to the Nevada Supreme Court at the time of appeal. Insofar as the issues raised are concerned, this court cannot determine that the original defense team or Mr. Connors was ineffective, taking into account all of the cir-

cumstances of this particular case. The evidence as presented in the transcripts is persuasive and the court can see how the jury arrived at its verdict.

In cases like this, the facts sometimes are so heinous that no attorney could present a defense that would assure a defendant's acquittal or ever obtain mercy from a jury. This would be true if the attorney were only rendering a minimal effective assistance or the attorney were a "perfect" attorney from the defense point of view. This seems to be such a case. In this case a 77-year-old lady was lured into the desert by six transient people. Some of the six people beat up the old lady by hitting her about the face, neck and shoulders with a screwdriver and hitting her head with a sledge hammer while robbing here. A coup de grace was, in effect, administered on her, while she lay bleeding on the desert floor. When the assailants left, the lady was not dead and she lived for some 20 days after this brutal assault. With the exception of one of the six people; i.e. Ramon Houston, the others showed no concern or remorse for their action. They didn't even call the hospital or police to notify them that a lady lay dying on the desert floor and needed help. It appears that the only concern of the assailants, except for Ramon Houston, was to get a beer.

By way of summary, this court has reviewed the evidence presented by the State and the Defendant, has read all the transcripts and many, many cases, has weighed the evidence in the light of *Strickland v. Washington* and from a totality of circumstances finds that Mr. Perkins, and the original defense team, and Mr. Connors offered reasonably effective assistance as attorneys in their representation of Ronnie Milligan.

Any pending motion in conflict with this Decision is denied.

DATED: September 5th, 1990.

/s/Llewellyn A. Young

Llewellyn A. Young, District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE MILLIGAN, Appellant, vs. THE STATE OF NEVADA Respondent.	)	No. 21504 FILED SEP 5 1991 CLERK OF SUPREME COURT By J. Richards CHIEF DEPUTY CLERK

ORDER

Appellant has moved to stay issuance of the remittitur pending his application to the United States Supreme Court for a writ of certiorari. Cause appearing, we grant the motion. *See* NRAP 41(b). Accordingly, we stay the issuance of the remittitur for thirty (30) days from the date of this order pending appellant's application for a writ of certiorari to the United States Supreme Court. If during the thirty (30) day period, the clerk of this court receives notice from the clerk of the Supreme Court of the United States that appellant has filed a petition for a writ of certiorari, this stay shall continue in effect until final disposition of the certiorari proceedings. *Id.*

It is so ORDERED.

/s/ C.J.

cc: Hon. Richard Wagner, District Judge
Hon. Frankie Sue Del Papa, Attorney General
William H. Smith
Susan Harrer, Clerk

APPLICABLE CONSTITUTIONAL PROVISIONS

(A) EX POST FACTO CLAUSE

Art. I, Section 10. *Limitations on powers of states.* No State shall . . . pass any . . . ex post facto Law . . .

(B) DUE PROCESS AND EQUAL PROTECTION

Amendment XIV, Section 1. ***Citizenship; privileges and immunities; due process; equal protection.*** . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.